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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM HOHRI, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BENJAMIN L. ZELENKO, ESQ.
(Counsel of Record)
B. MICHAEL RAUH, ESQ.
MARTIN SHULMAN, ESQ.
KARIN S. LEFF, ESQ.

LANDIS, COHEN, RAUH AND ZELENKO
1019 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 785-2020

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

40 pp

QUESTIONS PRESENTED

I. Whether the statute of limitations for plaintiffs' claims was tolled until the early 1980's when evidence of the government's fraud on this Court first became available?

II. Whether "sovereign immunity" bars compensation for intentional government violations of the fundamental constitutional rights of American citizens of Japanese ancestry interned during World War II?

III. Whether Executive Orders 9066 and 9102, and related statutes, regulations, and executive actions interning American citizens of Japanese ancestry during World War II made the government a fiduciary for those persons, for purposes of Tucker Act jurisdiction under *United States v. Mitchell*?

PARTIES TO THE PROCEEDINGS

Petitioners (plaintiffs below) are William Hohri, Hannah Takagi Holmes, Chizuko Omori (individually and as representative for Haruko Omori), Midori Kimura, Merry Omori, John Omori (individually and as representative of Juro Omori), Gladyce Sumida, Kyoshiro Tokunaga, Tom Nakao, Harry Ueno, Edward Tokeshi, Rentaro Hashimoto, Nelson Kitsuse (individually and as representative for Takeshi Kitsuse), Eddie Sato, Sam Ozaki (individually and as representative for Kyujiro Ozaki), Kumao Toda (individually and as representative for Suketaro Toda), Kaz Oshiki, George R. Ikeda, Tim Takayoshi, Cathy Takayoshi, and the National Council for Japanese American Redress.

Plaintiffs requested class certification (an issue not yet determined) for the class of persons defined as follows:

> The approximately 120,000 United States citizens and permanent residents, and representatives of such persons no longer living, who during World War II were subjected to forcible segregation, arrest, exclusion, imprisonment, curfew and travel restrictions, deportation, loss of citizenship, or other deprivations of their civil rights and liberties due to the fact of their Japanese ancestry, pursuant to President Proclamation 2525, Executive Order 9066, Public Laws 503 and 405, Presidential Proclamation 2655, or other actions and orders of the United States, its officers, agents, and employees.

Defendant herein is the United States of America, also referred to as the "government."

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Plaintiffs William Hohri, *et al.*, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit is reported at 847 F.2d 779 (Fed. Cir. 1988). The district court opinion is reported at 586 F. Supp. 769 (D.D.C. 1984).

JURISDICTION

The court of appeals' judgment was entered on May 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 1257(3).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This petition concerns constitutional claims under the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Thirteenth Amendments to the United States Constitution; the Habeas Corpus, Ex Post Facto, Bills of Attainder, and Privileges and Immunities Clauses; and Article III. Pertinent statutes and orders are: the Tucker Act, 28 U.S.C. § 1491; the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*; the All-Writs Act, 28 U.S.C. § 1651; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; the Administrative Procedure Act, 5 U.S.C. § 702; Executive Order 9066, 3 C.F.R 1092 (1942); and Executive Order 9102, 3 C.F.R. 1123 (1942). Relevant portions of these provisions are set out in the Appendix.

STATEMENT OF THE CASE

Plaintiffs are American citizens and permanent residents who were subjected to unprecedented mass racial discrimination by the United States government during World War II, solely on the basis of their Japanese ancestry. Plaintiffs seek monetary and declaratory relief on behalf of themselves and approximately 120,000 Americans similarly situated, for injuries arising from those wartime actions.

Following United States entry into World War II, War Department officials conferred with West Coast politicians and devised a plan of mass exile and detention for all Americans of Japanese ancestry on the west coast. ¶59, Amended Complaint, App.[1] 96-97. Subsequently, on February 14, 1942, the local military

[1] "App." refers to the Appendix filed with this Court.

commander issued a "Final Recommendation" to the President, urging that mass actions be taken against Americans of Japanese ancestry to prevent espionage and sabotage. JA[2]169. The military claimed that individual treatment was not feasible, because the Japanese race was "an enemy race" whose "racial strains are undiluted" despite their United States citizenship, and that loyal citizens assertedly could not be quickly distinguished from the disloyal. JA 169.

On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066 (App. 149-50), empowering the Secretary of War to exclude "any or all persons" from any designated areas. Pursuant to that Order and implementing legislation, Pub.L. No. 77-503, 56 Stat. 173 (1942), "exclusion orders" were issued banishing all Americans of Japanese ancestry from the entire state of California, and major portions of Oregon, Washington, and Arizona, and simultaneously ordering them detained indefinitely in racially segregated prison camps. In the camps, plaintiffs were denied virtually every fundamental right protected by the Constitution. Their mass exclusion and imprisonment continued for approximately three years without meaningful individual review, trials, or any pretense of due process.

Numerous contemporaneous legal challenges were raised against these discriminatory actions.[3] Those

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[2] "JA" refers to the Joint Appendix filed with the United States Court of Appeals for the Federal Circuit.

[3] Over fifty contemporaneous legal challenges were brought, including actions for injunctive and declaratory relief, habeas corpus, and constitutional challenges to criminal prosecutions for violations of the government's discriminatory orders. JA 215-219.

challenges were repeatedly denied by this Court and lower federal courts, based on the government's claim of "military necessity." *See Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); and *Yasui v. United States*, 320 U.S. 115 (1943). As a result, Americans of Japanese ancestry have had no judicial redress whatsoever for the government's wrongful actions,[4] and have suffered severe stigma and injury due to this Court's affirmation of the government's wartime policies.

In the early 1980's, archival documents were discovered and later made available for the first time to plaintiffs and the general public, showing that responsible government officials at the time *actually knew* there was no factual justification to the claim of "military necessity" and *knew* the exclusion and detention program was solely the product of racial animus. Exhibits J, K, and L, Amended Complaint, App. 131-43. Those documents further showed that government officials deliberately concealed this crucial evidence from this Court, and intentionally obstructed plaintiffs' contemporaneous access to judicial redress for the government's own wrongful actions.[5] ¶¶ 93-103, Amended Complaint, App. 112-117.

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[4] Limited administrative redress was provided by the 1948 American-Japanese Evacuation Claims Act, 50 U.S.C. App. §§ 1981 *et seq.*, but that Act was predicated on the government's continuing claim that the wartime actions were based on "military necessity," and did not permit review or redress for the constitutional wrongs, personal injuries, or numerous other injuries inflicted on Americans of Japanese ancestry. *See* S. Rep. No. 1740 (80th Cong., 2d Sess.), *reprinted in* 1948 U.S. Code Cong. & Ad. News 2298-2300; and S. Rep. No. 601 (82d Cong., 1st Sess.), *reprinted in* 1951 U.S. Code Cong. & Ad. News 1694.

[5] Legislation to authorize partial compensation recently passed

Based on this newly discovered evidence, plaintiffs filed suit against the United States in March, 1983. Their Complaint asserts twenty-two claims for compensatory and declaratory relief including claims for violation of: Due Process; Equal Protection; Unjust Taking; Protection from Unreasonable Arrest, Search and Seizure; Privileges and Immunities; Right to Fair Trial and Representation by Counsel; Protection from Cruel and Unusual Punishment; Freedom of Religion; Freedom of Speech and Press; Freedom of Association; Freedom of Petition for Redress of Grievances; Privacy, Travel, and other Constitutional Rights; Protection from Involuntary Servitude; Bills of Attainder and Ex Post Facto Laws; Denial of Habeas Corpus; Conspiracy to Deprive Civil Rights; Assault and Battery; False Arrest and False Imprisonment; Abuse of Process and Malicious Prosecution; Negligence; Contract; and Breach of Fiduciary Duty.

PROCEEDINGS BELOW/PRIOR APPEALS

The government moved to dismiss plaintiffs' Complaint, citing sovereign immunity, statutes of limita-

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both Houses of Congress, and has been reported favorably by a House-Senate Conference Committee (H.R. Rep. No. 100-785, 100th Cong., 2d Sess. (1988)). As of this writing the measure has been approved by both Houses. If signed by the President and fully funded by appropriations over its ten (10) year term, the legislation would authorize payment of $20,000 to individuals of Japanese ancestry living on the date of enactment who were interned, or, if deceased, payment is restricted to their surviving spouse, children, or parents. The conference agreement makes no provision for internees who died prior to enactment, or whose losses exceed $20,000. Acceptance of payment is deemed full satisfaction of all claims against the United States, but the bill does permit eligible individuals to choose pursuing the instant litigation rather than receiving payment under the statute.

tions, and alleged exclusivity of the 1948 American-Japanese Evacuation Claims Act, 50 U.S.C. App. § 1981 *et seq.*, (hereinafter "1948 Claims Act"). Plaintiffs opposed dismissal, asserting (1) the 1948 Claims Act was constitutionally deficient and not the exclusive remedy for plaintiffs' injuries; (2) sovereign immunity does not bar plaintiffs' claims in light of specific constitutional and statutory grants of jurisdiction, and the egregious facts of this case; and (3) plaintiffs' claims were timely because deliberate governmental fraud and concealment tolled the statutes of limitations until the early 1980's, when direct evidence of fraud was uncovered.

The district court, granting dismissal, ruled that the 1948 Claims Act was not the exclusive remedy for plaintiffs' injuries. *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984). The district court found waivers of sovereign immunity under the Tucker Act for plaintiffs' contract claim (Count XXI) and Takings Clause claim (Count III), but found no waiver of sovereign immunity for plaintiffs' other constitutional claims (Counts I-II, IV-XV). The district court held the Federal Tort Claims Act was a waiver of sovereign immunity as to plaintiffs' causes of action sounding in tort (Counts XVI-XX), but held they were barred due to plaintiffs' failure to file preliminary administrative claims. The district court further ruled there was no fiduciary relationship between plaintiffs and the government to support Count XXII.

The district court also held that government officials concealed and misrepresented critical intelligence information before this Court during the war. Without any evidentiary hearings, however, the district court held plaintiffs had sufficient notice of that conceal-

ment through isolated post-war scholarly references in the late 1940's and early 1950's. The district court therefore held the statute of limitations was tolled only during that early period, and therefore even plaintiffs' contract and Takings Clause claims were now time-barred.

Plaintiffs first appealed to the United States Court of Appeals for the District of Columbia Circuit, which held plaintiffs' Takings Clause claims were timely, because of fraud and concealment by government officials before this Court, and because of the strong deference due the military commander's judgment and the decisions this Court based thereon, at least until the creation of the Commission on Wartime Relocation and Internment of Civilians ("CWRIC") by Congress in 1980, Pub.L. No. 96-317, 94 Stat. 964. The District of Columbia Circuit affirmed the district court's decision in all other significant respects. *Hohri v. U.S.*, 782 F.2d 227 (D.C. Cir. 1986). The government filed a suggestion for rehearing *en banc*, which was denied. 793 F.2d 304 (D.C. Cir. 1986)

Plaintiffs and the government both sought further review in this Court, which vacated the judgment of the District of Columbia Circuit on jurisdictional grounds and remanded the case with instructions that the appeal be transferred to the Federal Circuit. *Hohri v. U.S.*, 482 U.S. ___, 107 S.Ct. 2246 (1987).

By a two-to-one *per curiam* vote, the United States Court of Appeals for the Federal Circuit adopted the judgment of the district court. *Hohri v. U.S.*, 847 F.2d 779 (Fed. Cir. 1988). Senior Circuit Judge Baldwin vigorously dissented from the panel's ruling on the statute of limitations, stating (847 F.2d at 782):

Appellee's actions during the War clearly constituted fraudulent concealment. The district court found, based on the pleadings and the historical evidence, that appellee did, in fact, conceal critical evidence during the prosecution of *Hirabayashi* and *Korematsu* before the Supreme Court. 586 F. Supp. at 787-88. But the court found that once the Hoover, Fly, and Ringle documents, all objects of concealment, were leaked, the statute had run. *Id.* I disagree that these documents were sufficient to rebut the presumption of military deference provided by the Supreme Court in *Hirabayashi* and *Korematsu*. These documents constituted only a small portion of the information concealed, and by no means the most important information.

REASONS FOR GRANTING THE WRIT

> Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . [but] Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, [and] because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily . . .

Korematsu v. United States, 323 U.S. at 223 (1944).

I. This is an historic case of mass constitutional violations imposed on innocent Americans due solely to racial animus.

During World War II, the United States government forcibly deprived 120,000 loyal American citizens and permanent residents of their most fundamental constitutional freedoms, solely on the basis of their race. These actions were motivated by racial animus, ill will, and wartime hysteria.

The seeds for such mass deprivations were sown long before Pearl Harbor. Federal and state laws had for many years discriminated against Americans of Japanese ancestry, denying them citizenship and the right to purchase property, and relegating them to a second-class existence.[6] When Japanese Imperial forces attacked Pearl Harbor, the effects of discrimination and segregation gave rise to rampant racism, and Americans of Japanese ancestry became a national scapegoat.

Following United States entry into the war, the government carried out a concerted and pre-planned[7]

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[6] *See, e.g.*, 8 U.S.C. § 703, Immigration Act of 1924; that discriminatory naturalization law was not repealed until 1952. *See also*, U.S. Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1983), pp. 27-42.

[7] Several years before the Pearl Harbor attack, plans were made at the highest levels of the government that "concentration camps" should be built for imprisoning Americans of Japanese ancestry (citizens and non-citizens) in the event of "trouble" and in order to "impress the Japanese with the seriousness of our preparations" for war. *See* October 9, 1940, Memorandum from Secretary of Navy Knox to President Roosevelt, (Exhibit A, Amended Complaint, JA 143); and August 10, 1936 Memorandum from President Roosevelt to Chief of Naval Operations (Exhibit B, Amended Complaint, JA 145).

mass exile and imprisonment of all Americans of Japanese ancestry on the West Coast, citizens and residents alike. Over 120,000 men, women, and children were rounded up at gun point. Hospitals, orphanages, and asylums were raided. Plaintiffs were all banished to forsaken prison camps, where they were detained under harsh and dangerous conditions by their own government for periods averaging three years. *See*, ¶¶66-92, Amended Complaint, App. 100-12. These actions were taken without probable cause, filing of criminal charges, or trials. No similar actions were taken against Americans of Italian or German ancestry.[8]

Plaintiffs suffered devastating losses of liberty, dignity, livelihood, property, and life itself. The captives did not know how long they would be imprisoned or whether they would survive the camps. Many did not. Others survived physically but the substance of their lives was destroyed by the government's actions, which deprived them not only of their freedom, but also of their honor. At times they were treated worse than animals—entire families were often housed in

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[8] Government officials also planned to imprison over 100,000 Americans of Japanese ancestry living in Hawaii, where martial law had actually been imposed. This plan was unsuccessful primarily because the large percentage of Americans of Japanese ancestry in the island's population (35%) and their great value as labor made such an effort impracticable. However, over 2,000 Americans of Japanese ancestry were either selectively imprisoned in island camps or deported to mainland prison camps. By contrast, Americans of Japanese descent constituted at most 3% of any West Coast state's population, all of whom were imprisoned. *See*, generally, Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1983), pp. 261-82.

single horse stalls. They were shunned, despised, and blamed for the atrocities of the Japanese Imperial forces, simply because of their facial characteristics. Their psychological trauma was immense; there is no way to prove oneself loyal when one is branded as disloyal solely "by blood." The local commanding general's theory was "once a Jap, always a Jap":

> In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized", the racial strains are undiluted . . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

See "Final Recommendation" from General Dewitt to the Secretary of War, dated February 14, 1942, Exhibit G, Amended Complaint, JA 169.

Yet, not a single act of espionage or sabotage by Americans of Japanese ancestry in the United States was ever shown. Rather, these Americans went to extraordinary lengths to "prove" their loyalty. Most of them peacefully assembled in response to the government's orders for mass exile and imprisonment, relying on their government's promises to protect them and their property. They shunned physical re-

sistance, and instead petitioned for redress, raising hundreds of administrative and legal challenges to the wartime actions, only to suffer resounding defeats due to this Court's imprimatur of the government's claim of "military necessity." When the War Department inflicted the ultimate insult of forcibly conscripting its supposedly disloyal prisoners into racially segregated combat units, these Americans served with unequaled valor in units which suffered over 300% casualty rates and earned more commendations for bravery than any other in the war. ¶90, Amended Complaint, App. 111.

This Court three times directly upheld the mass infringement of all of these Americans' most basic freedoms solely on the basis of their race. *Korematsu v. United States*, *supra*; *Hirabayashi v. United States*, *supra*; and *Yasui v. United States*, *supra*. In so doing, this Court bestowed on the government's outrageous actions the highest stamp of approval. This Court not only condemned the women, children, and men of the plaintiff class to live out the war years in prison camps; it also established the dangerous legal precedent, which continues to "lie about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need," *Korematsu v. United States*, 323 U.S. at 246 (Jackson, J., dissenting) that the Constitution may permit mass exile and imprisonment of American citizens and residents solely on the basis of their race.[9]

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[9] As Justice Powell recognized in *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (concurring opinion), "Only two of this Court's modern cases have held the use of racial classifications to be constitutional," citing *Korematsu* and *Hirabayashi*. *See also*, L. H. Tribe, *American Constitutional Law* §§ 16-6, 16-14 (1978).

The judiciary is the last bastion for protecting the rights of minorities against abuses of government power. In light of the government's grievous fraud and deliberate obstruction of every means of judicial relief normally available to plaintiffs, this Court should not leave the question of constitutional redress to the political process, including action—or inaction—by Congress or the Executive, *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), and should review the decisions below which have left plaintiffs with no judicial remedy whatsoever.

II. This Court should address the taint of decisions fraudulently procured, in order to vindicate its own processes.

This Court must confront the question—perhaps an unprecedented one—of what it should do when its own decisions have been tainted by government misconduct. When Solicitor General Charles Fried argued the jurisdictional question before this Court in the prior hearing of this case (Transcript of Oral Argument of the Solicitor General in *Hohri v. United States*, No. 86-510, April 20, 1987, pp.4-5), the government admitted for the first time in this tribunal that its wartime actions were shameful, wrong, and racially-motivated.[10] But those actions were not merely

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[10] General Fried admitted that:

> The Japanese Americans for cultural and frankly racial reasons could not be presumed to enjoy the presumption of loyalty which other Americans did and that therefore, it was too dangerous to leave them at large along the West Coast of America. It is this basing of our action on a judgment of what Justice Murphy in his dissent correctly identified as a sort of amateur socio-anthropology with a frankly

deplorable; they were duplicitous. And, it was not for want of asking by this Court that the wrong result was reached. It was not the questions which were wanting—it was the answers that the government gave.

The government's wartime explanation of the alleged "military necessity" underlying the need to imprison plaintiffs was a book entitled the *Final Report*, nominally authored by the west coast military commander, General DeWitt. During preparation of the government's wartime brief to this Court in *Korematsu*, it came to the attention of attorneys in the Department of Justice that there were serious inaccuracies in the factual underpinnings of the *Final Report*. They therefore sought to alert this Court to those inaccuracies by inserting a footnote in the government's brief, stating:

> The [Final Report's] recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in possession of the Department of Justice. In view of the contrariety of the reports on this matter, we do not ask the Court to take judicial

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racist caste which was our shame.

Respondents complain now, as they did then, that this was a wrong judgment. It was.

Hohri v. United States, No. 86-510, Transcript of Oral Argument, April 20, 1987, p. 5.

> notice of the recitals of those facts contained in the Report.

Memorandum from John L. Burling to Assistant Attorney General Wechsler, September 11, 1944, quoted in *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984). Military officials, alerted to the footnote, physically intervened while the briefs were at the printer, and caused the footnote to be rewritten.[11]

Sensitive to the ramifications of whether the Court was receiving the whole truth on "military necessity" during the wartime argument of the *Korematsu* case, Chief Justice Stone specifically asked whether the *Final Report* reflected "all that was known, or could be known, by the military authorities in forming this judgment." (Transcript of Oral Argument of the Solicitor General in *Korematsu* v. *United States*, October 12, 1944, p.10). The Solicitor in response failed to disclose the authoritative contrary intelligence reports then in the government's possession, including FBI, FCC, and Office of Naval Intelligence reports, and continued to invite the Court's judicial notice of the alleged facts underlying the military commander's actions. *Id.*

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[11] For a full account of these dramatic events, *see*, Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases*, Oxford University Press (New York, 1983) Chapter 11, "The Printing Stopped About Noon," pp. 278-310. The revised footnote deleted all mention of "contrariety" of facts, and stated, "We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice; and we rely upon the *Final Report* only to the extent that it relates to such facts." Brief for the United States, at 21-22, *Korematsu v. United States*, 323 U.S. 214 (1944).

In retrospect, Mr. Justice Frankfurter hit the nail most squarely on the head, asking (*Id.*, at 10-11):

> MR. JUSTICE FRANKFURTER: Suppose the commanding general, when he issued Order No. 34, had said, in effect, "It is my judgment that, as a matter of security, there is no danger from the Japanese operations; but under cover of war, I had authority to take advantage of my hostility and clear the Japanese from this area." Suppose he had said that, with that kind of crude candor. It would not have been within his authority, would it.
>
> THE SOLICITOR It would not have been.
>
> MR. JUSTICE FRANKFURTER: As I understand the suggestion, it is that, as a matter of law, the report of General DeWitt two years later proved that that was exactly what the situation was. As I understand, that is the legal significance of the argument.
>
> THE SOLICITOR: That is correct, Your Honor; and the report simply does nothing of the kind.

What the Solicitor General failed to disclose was that exactly the kind of *Final Report* Mr. Justice Frankfurter envisioned had indeed been authored by General DeWitt, but all copies of it had already been ordered burned, so as not to disclose the true motives which were operating. All of these facts were not learned until very recently, *See, infra*, Argument III.

The government's wartime actions pierced the very heart of our legal system. The judicial process re-

quires that all litigants be diligent and forthright. *See, Hazel Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). But even today, the government has not told the entire story about the wartime internment; indeed, the Court has not yet required this disclosure. At the very least, to vindicate its own authority, this Court should require an evidentiary hearing in the district court on the statute of limitations issue in order to determine whether the wrongs previously committed can be righted.

This Court should right the record for the sake of the individuals who have previously been deprived of a judicial remedy because this Court's wartime precedent precluded presentation of their claims, and simply for the sake of justice.

III. The decisions below are in conflict with recent Ninth Circuit rulings that the newly discovered evidence of fraud renders relief timely.

Three separate federal district courts as well as the Ninth Circuit have found that the recently uncovered Department of Justice records showing deliberate government fraud and concealment were a timely basis for granting petitions for writs of error *coram nobis* filed in 1983 by Messrs. Korematsu, Hirabayashi, and Yasui.[12] One of these decisions, for example, states that prior to the 1980's, there was no specific evidence of governmental misconduct available:

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[12] *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984); *Yasui v. United States*, No. CV 83-151-BE, Order of January 26, 1984 (D.Ore.1984); and *Hirabayashi v. United States*, 627 F.Supp. 1445 (W.D. Wa. 1984).

> The government has also failed to rebut petitioner's showing of timeliness. It appears from the record that much of the evidence upon which the petitioner bases his motion was not discovered until recently. *In fact, until the discovery of the documents relating to the government's brief before the Supreme Court, there was no specific evidence of governmental misconduct available.*

Korematsu v. United States, 584 F. Supp. at 1419. [Emphasis added].

In a government appeal from the grant of Mr. Hirabayashi's petition for writ of error *coram nobis*, the Ninth Circuit also recently reviewed the government's claim of untimeliness and categorically rejected it. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), *petition for rehearing en banc denied*, December 24, 1987. That court began its discussion of the case by noting, 828 F.2d at 593:

> *The event which triggered the lawsuit occurred in 1982*, when an archival researcher discovered the sole remaining copy of the original report prepared by the general who issued the curfew and exclusion orders. This report was intended to explain the basis for those orders. War Department officials revised the report in several material respects and tried to destroy all of the original copies before issuing the final report. The Justice Department did not know of the existence of the original report at the time its attorneys were preparing briefs in the *Hirabayashi* and *Korematsu* cases. [Emphasis added.]

As the Ninth Circuit observed, 828 F.2d at 598, "Most significantly, the original report did not purport to rest on any military exigency, but instead declared that because of traits peculiar to citizens of Japanese ancestry it would be impossible to separate the loyal from the disloyal . . ." Continuing, the court stated, 828 F.2d at 599:

> . . . while the Supreme Court based its decision in *Hirabayashi* upon deference to the military judgment of the need for expediency, General DeWitt, the person responsible for the racially based confinement of American citizens, made no such judgment. The district court further found that the United States government doctored the documentary record to reflect that DeWitt had made a judgment of military exigency.

With regard to the materiality of the fraud, the Ninth Circuit emphasized the "critical nature of General DeWitt's decision and his report," 828 F.2d at 600, and rejected the government's position on the timeliness issue which relied on the Grodzins book and similar texts which led the district court astray in this case, 828 F.2d at 605, stating:

> The government argues that the district court should have dismissed the petitioner's claim on the ground of laches. It argues that the material upon which the petitioner relies had been a matter of public record for decades, or, alternatively, that the petitioner by due diligence should have found the material earlier. For the reasons we have discussed in the preceding section of this opinion, the district court's decision to grant the writ was

clearly based upon material which was not known until very recently. The key document upon which the district court relied was the suppressed report of General DeWitt. The district court squarely confronted the government's laches contention by stating as follows:

> . . . At no place in [the 1949 Grodzins book] is there any reference to the statements made by General DeWitt in the initial version of his Final Report. In none of the other publications submitted by the government is there any such reference.

627 F. Supp. at 1455. These findings are clearly supported.

The suppressed DeWitt report is not the only evidence which has surfaced as a result of research during this decade. There are memos, which have only recently come to light, by Justice Department lawyers Ennis and Burling, relating to the War Department's suppression of the revised report, and their doubts about the accuracy of the report . . . The discovery of these materials recently caused the District of Columbia Circuit to hold that the government's fraudulent concealment tolled the statute of limitations in cases brought by Japanese Americans for civil damages arising out of their internment. *Hohri v. United States*, 782 F.2d 227, 246 (D.C. Cir. 1986), *vacated on jurisdictional grounds*. 482 U.S. ___, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987).

Plaintiffs here cannot be taxed with a lack of diligence in their search for documentation refuting the government's claim of military necessity. In the *Hirabayashi coram nobis* proceeding, the Ninth Circuit found that Mr. Hirabayashi had been diligent in his attempt to challenge the conviction, 828 F.2d at 605, stating:

> As to the diligence of Hirabayashi in finding the material we must agree with the district judge who heard direct evidence on this issue and found that "petitioner cannot be faulted for not finding and relying upon [the only surviving copy of the initial version of the report] long before he brought this action in early 1983." 627 F. Supp. at 1455. Professional historians had failed to discover it as well, and the difficulty for a lay person to locate the initial version was documented in the record by testimony concerning its discovery.

Plaintiffs could not reasonably have been expected to find the tell-tale documents which had eluded so many historians for so many years. Judge Baldwin, dissenting from the opinion of the Federal Circuit, suggests that plaintiffs' standard of diligence should be one of "reasonableness," 861 F.2d at 783-84, and that had the plaintiffs filed their claims in the 1940's and 1950's, the case would have been dismissed on the pleadings due to the decisions in *Hirabayashi* and *Korematsu*. Plaintiffs were reasonable to wait to file their suit until the "military necessity" rationale had been rebuffed and they had evidence of a "cognizable" claim.

Thus, plaintiffs must respectfully disagree with the conclusion of the district judge below, and the two panel members of the Federal Circuit who affirmed that decision *per curiam*. In light of all that has been said before, plaintiffs must appeal to this Court for enforcement of the rigorous standards barring peremptory dismissals at the pleading stage. The district judge acted without evidentiary hearings and findings by the jury as the trier of the fact, even though the meaning and import of the recently-discovered historical record was sharply in controversy. Decisions of other district courts as well as the Ninth Circuit are facially in conflict with the rulings of untimeliness below. Given the magnitude of the interests at stake and the wrongs which concededly were committed, those rulings should not be left unreviewed.

IV. Given the unprecedented fraud on this Court and the deliberate denial of otherwise available remedies, the courts below looked too narrowly at the scope of relief for the government's wartime wrongs.

A. Plaintiffs' constitutional claims are not barred by sovereign immunity.

The lower courts' decisions establish the untenable proposition that even in this case of unprecedented and deliberate fraud, the federal judiciary is without power to award relief for mass infringements of fundamental constitutional rights. Such a rigid application of sovereign immunity doctrine is inappropriate in this case, because it would destroy all plaintiffs' constitutional rights and reward the government for perpetrating a successful fraud. Yet now that the fraud has finally been discovered, the government argues there is no judicial power to address it. The Constitution would be meaningless verbiage if the

government could commit deliberate fraud, deny all prospective relief, and then hide behind the cloak of sovereign immunity when compensatory and declaratory relief are sought as the sole remaining means of redress.

In light of the government's pervasive and deliberate wrongdoing, there is a sufficient jurisdictional predicate to hear plaintiffs' claims, based on Article III of the Constitution and existing statutory waivers of sovereign immunity. The Tucker Act, 28 U.S.C. § 1491, by its own terms waives sovereign immunity for "claims against the United States arising under the Constitution." This Court held in *United States v. Mitchell*, 463 U.S. 206, 216 (1983), that where a claim "falls within the terms of the Tucker Act, the United States has presumptively consented to suit." Thus, plaintiffs here should not need to show any further consent by Congress as a precondition to their fifteen causes of action (Counts I-XV) "arising under this Constitution." In order for claims to be actionable under the Tucker Act, this Court has further required a showing that the rights upon which plaintiffs rely must "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.*, at 217. In prior cases, this Court has looked solely to whether the constitutional right is accompanied by an express textual provision for compensation—and only the Fifth Amendment Takings Clause thus far has been interpreted as containing such a provision. In the highly unusual facts of this case, however, this Court's determination of whether a constitutional right "mandates compensation" should also be based on whether there are any other ade-

quate judicial remedies available to redress plaintiffs' injuries.[13]

In this case, all normally available judicial remedies were deliberately denied by the government as part and parcel of its own pervasive wrongdoing. Indeed, the government's unprecedented fraud upon this Court resulted in three decisions upholding the wartime deprivations and barring further legal claims

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[13] In addition to Tucker Act jurisdiction for plaintiffs' constitutional claims (Counts I-XV), defendant's breach of contract (Count XXI), and defendant's breach of fiduciary duty (Count XXII), the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et seq.*, provides jurisdiction for plaintiffs' claims sounding in tort, quasi-constitutional tort, and civil rights violations (Counts XVI-XX).

Plaintiffs should not be barred from FTCA remedies for failure to file administrative claims pursuant to 28 U.S.C. § 2675(a). The very highest levels of government, including Congress, the President, and this Court, ratified the wartime actions. Any agency claims were futile. The agencies did not have power to overturn Supreme Court decisions and accord the constitutional relief which plaintiffs seek. Requiring compliance with § 2675(a) would have been a logistical nightmare and needless folly for the 120,000 claimants, or even named plaintiffs, as many of the relevant agencies no longer exist, and settlement prospects were non-existent. Any congressional interest in thorough agency investigation of claims has already been fulfilled by Congress' own Commission on Wartime Relocation and Internment of Civilians, expressly created for that purpose in 1980. Further, the agency filing requirement was not even in existence at the time the FTCA was passed and when most of the plaintiffs were still in prison camps. That requirement should not be applied now, because the government's wrongdoing prevented earlier assertion of the claims. *Accardi v. United States*, 356 F. Supp. 218 (S.D.N.Y. 1973). Accordingly, § 2675(a) should not interfere with the remedial purposes underlying the FTCA's waiver of sovereign immunity for plaintiffs' claims.

thereon: *Korematsu, Hirabayashi,* and *Yasui, supra.* Yet the constitutional rights asserted here surely require judicial vindication. If the government itself deliberately obstructed contemporaneous methods of judicial relief which would not have been barred by the defense of sovereign immunity, the government should not now be able to use "sovereign immunity" as a jurisdictional "Catch 22." To rule otherwise would allow wrongdoers to profit from their wrongs, and would eliminate the judicial branch's jurisdiction over the most egregious violations of law. *See, Hazel Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. at 2386; *United States v. Lee,* 106 U.S. 196, 218-220 (1882); and the All-Writs Act, 28 U.S.C. §1651. Given the particular circumstances of this case, the constitutional violations alleged in Counts I-XV of plaintiffs' Complaint "may be fairly interpreted as mandating compensation . . . for damages sustained." *Mitchell, supra,* 463 U.S. at 217.

Even should this Court restrict its examination to losses recoverable only under the Takings Clause, takings of "property" in this case should be interpreted to include the destruction of vested constitutional rights on which all notions of "property" are based. The Constitution creates settled expectations of liberty and justice, breaches of which are normally actionable via prospective injunctive action, habeas corpus, and the like. When egregious wrongful conduct occurs and judicial remedies are deliberately obstructed, the right to judicial relief must be held to vest, and to be actionable retrospectively after cessation of the obstructive conduct. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982); *Pitts v. Unarco Industries, Inc.,* 712 F.2d 276, 279 (7th Cir. 1983).

In the ultimate analysis, this Court may create a comprehensive remedy for government's egregious conduct, and need not be constrained to find an express statutory waiver of sovereign immunity. As Justice Harlan stated in *Bivens v. Six Unnamed Agents*, 403 U.S. 388, 407 (1971) (concurring):

> The question then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted. [Citations omitted.] In resolving that question, it seems to me that the range of policy considerations we may take into account is at least as broad as the range a legislature would consider with respect to an express statutory authorization of a traditional remedy.

Creation of such a remedy is appropriate in this case. The magnitude of the wrong is so great that, as in *Bivens*, the Court must fashion a remedy to right it. Here as in *Bivens*, "It is damages or nothing, so damages it must be." *Id.*, at 410.

Article III jurisdiction extends to all cases "arising under this Constitution" and "to controversies to which the United States shall be a party." Historically, Article III has provided a jurisdictional basis to hear and redress claims for constitutional injuries: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). *See Note: Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U.L. Rev. 597 (1982); *Comment: Sovereign Immunity — An Anathema to the "Constitutional Tort,"* 12 Santa Clara Lawyer 543, 556-59 (1972).

This Court held in *Bell v. Hood*, 327 U.S. 678 (1946), that the federal judiciary has inherent power under Article III to hear claims against the United States for constitutional violations, and to create all necessary remedies to enforce federal constitutional rights. In *Bivens, supra*, this Court created a retrospective damages remedy against federal officials for constitutional infringements, because other relief was unavailable. In *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court extended damages remedies to constitutional violations by municipalities, stating: "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." Certainly, the Court here should do no less with respect to deliberate constitutional violations by the federal government.

This case is *sui generis*. *Hohri v. United States*, 782 F.2d at 249 (D.C. Cir. 1986). An effective remedy in this case need not be held to expand the general rule of sovereign immunity in other cases, where governmental wrongdoing was not as egregious, or prospective legal remedies were not fraudulently withdrawn.

This Court should hold that it has inherent Article III jurisdiction to authorize review and redress of plaintiffs' injuries so as to redress the assault on its own integrity resulting from the government's fraud, and it should so order.

B. A fiduciary duty existed here.

It is especially important for this Court to review the fiduciary duty issues raised here in the context of its ruling in *United States v. Mitchell,* 463 U.S. 206 (1983). The district court held there was no such actionable duty in this case. App. 60-61. Yet, in its program of mass exclusion and internment pursuant to Executive Orders 9066 and 9102, the government clearly did undertake express and implied fiduciary responsibilities toward plaintiffs by pervasive control of every aspect of their daily lives, and by forcing them into a position of dependency and exploitation. *See, e.g.,* Exhibits, O, P, and Q to Amended Complaint, JA 196-216. Plaintiffs depended on the government for their every need. Fiduciary relationships have been recognized to arise as a result of similar pervasive government control of Indians, *United States v. Kagama,* 118 U.S. 375 (1886); *Short v. United States,* 719 F.2d 1133 (Fed. Cir. 1983); *Moose v. United States,* 674 F.2d 1277 (9th Cir. 1982); *Oldland v. Gray,* 179 F.2d 408, 414 (10th Cir. 1950). The same is true for Bikini Islanders, *Juda v. United States,* 6 Cl. Ct. 441 (1984).

All the elements of a traditional fiduciary relationship are present here. The government repeatedly stated it was acting for the benefit of plaintiffs, and promised expressly to protect their rights and property. The courts below looked too narrowly for an express statutory creation of a fiduciary relationship, instead of considering all applicable statutes, regulations and governmental pronouncements as part of the total circumstances which must be examined in ruling on this issue. *Gila River Pima-Maricopa Indian Community v. United States,* 9 Cl. Ct. 660 (1986);

White Mountain Apache Tribe of Arizona v. United States, 9 Cl. Ct. 1 (1985). It was plain error to deny a remedy for breach of fiduciary duty without even an evidentiary hearing to explore and resolve the factual issues inherent in such an inquiry. *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir. 1983); *Bell v. Hood,* 327 U.S. 678, 681-83 (1946). Accordingly, this Court should recognize plaintiffs' right to prove the existence of a fiduciary relationship giving rise to compensable claims under the Tucker Act, and reverse the judgments below so as to allow plaintiffs a hearing on that claim, and other issues.

CONCLUSION

For the above reasons, this Court should grant the writ of *certiorari* to review the full scope of remedies available to plaintiffs and to redress the unprecedented wrongs to petitioners and this Court.

Respectfully submitted,

Benjamin L. Zelenko, Esq.
(Counsel of Record)
B. Michael Rauh, Esq.
Martin Shulman, Esq.
Karin S. Leff, Esq.

Counsel for Petitioners

Landis, Cohen, Rauh and Zelenko
1019 Nineteenth Street, N.W.
Suite 500
Washington, DC 20036
(202) 785-2020
August 1988.